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THE

CIVIL LAW AND THE COMMON LAW IN CANADA.

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THE CIVIL LAW AND THE COMMON LAW IN CANADA.

IN Canada the two great legal systems of Christendom, the Civil law and the Common law, are both represented. In the ancient world the Roman law followed everywhere in the train of the legions. It took such deep root that it was not swept away even in the crashing ruin of the Roman empire. Broadly speaking, the modern law of France, Belgium, Holland, Germany, Austria, Italy, Spain, and Portugal is still Roman law. It is, of course, the Roman law with a difference. Every country has modified it in a thousand ways. In all it is mingled with a proportion greater or less of law taken from other sources—*e.g.*, in Germany it is customary to divide the law into two branches—one styled Modern Roman Law (heutiges Römisches Recht), and the other German Private Law (Deutsches Privat-recht). The former includes that part of the law which is of Roman origin though modified in detail; the latter that part which is of modern introduction or rests upon independent German customs. In France the *droit coutumier* of the north contained a great deal that was not drawn from Roman sources, while the south the *pays de droit écrit* retained the Roman law only slightly diluted. In both France and Germany there are important branches of the law, and especially the great chapter of obligations, which are still almost pure Roman law.

France, Spain, and Portugal carried their laws with them to the new world. French law still forms the basis of the law of Quebec and of the law of the State of Louisiana, and

Spanish or Portuguese law that of the greater part of South America. Holland also carried her laws into Africa and America and they still remain in the Cape Colony, Natal, the Transvaal Republic, and in British Guiana, under the name of the Roman Dutch law. Over against this group of countries which have laws derived from the Roman law—the countries of the Civil law—must be set the group which have laws derived from the laws of England—the countries of the Common law. Here the New World has redressed the balance of the old. In Europe, England and Ireland stand alone. But in North America, the whole Continent, if we exclude Quebec and Louisiana, is governed by laws founded upon the English Common law.(*a*) No doubt in Canada and the United States a mass of legislation has profoundly changed many branches of the law, and has created great diversity between the law of one province or state and that of another. No doubt also judicial decisions have interpreted it in diverse ways according to the capacity of the judge, and have in this way helped to differentiate laws originally identical. But in its cardinal principles the Common law of England is the basis of the law of the United States. Chancellor Kent says of it, "It is the common jurisprudence of the people of the United States, and was brought with them as colonists from England and established here *so far* as it was adapted to our institutions and circumstances." It was claimed by the Congress of the United Colonies which met at Philadelphia in 1774, on the eve of the American War of Independence, as a branch of those "indubitable rights and liberties to which the respective colonies are entitled." "It fills up," says Kent, "every interstice and occupies every wide space which the Statute law cannot occupy" (Commentaries, i. 343, Lacy's Ed.). And as another American writer well puts it, "It is interwoven with the very idiom

(*a*) There are, I believe, some traces of Spanish law in Texas, and perhaps in one or two other States. And in Louisiana both Spanish and French influences are traceable. But, as a broad statement, the proposition in the text is sufficiently accurate.

that we speak, and we cannot learn another system of laws without learning at the same time another language" (Du Ponceau on Jurisdiction, p. 91). And Kent refers to the declaration by the Supreme Court of the United States at an early period in the history of that famous Court, "that the remedies in the federal Courts at Common law and in equity were to be, not according to the practice of State Courts, but according to the principle of Common law and equity as distinguished and defined in that country from which we derived our knowledge of those principles" (Kent, *ibid.* i. 342).

Just as the Roman law outlived the Roman authority in Gaul and Spain, so the English law survived the severance of the United States from the British Empire.

In Canada there are certain laws applicable to the whole Dominion. These are—(1) The Criminal law, which is of English origin, and was codified in 1892 by the Dominion Statute, 55 & 56 Vict. cap. 29; (2) The statutes passed by the Dominion Parliament since 1867 when the provinces were confederated; (3) The few Imperial Statutes passed since responsible Government was introduced, which are applicable to Canada. One of the most important is the Merchant Shipping Act 1894. In addition to these laws common to the whole Dominion, each province with its independent local legislature has its own laws, administered by its own Courts. The judgments of the provincial Courts are under certain conditions subject to appeal to the Supreme Court at Ottawa, or to the Privy Council in England. Of the seven provinces six—Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Manitoba, and British Columbia have laws based upon the English Common law. The Province of Quebec alone has a system mainly drawn, mediately from the old French law, and ultimately from the Roman law. The enormous tract of the North-West Territories is also governed by a Common law system. It is, of course, essential in considering whether a particular rule of the English law, or a particular British Statute, forms part

of the law of a Canadian province to have regard to the precise date on which the English law or, in the case of Quebec, the French law, was adopted as the law of the colony. I shall, therefore, narrate in few words the time and manner of this adoption or "reception" in each province.

MARITIME PROVINCES. — By the Treaty of Utrecht in 1713, Nova Scotia was ceded by France to England. It included the present Province of New Brunswick. Cape Breton and Prince Edward Island were ceded by the Treaty of Paris in 1763. Before the cession neither France nor England held undisputed sway. The Nova Scotia Act 33 Geo. II. c. 3 (1759) declared, "That this province of Nova Scotia or Acadia and the property thereof did always of right belong to the Crown of England, both by priority of discovery and ancient possession." It was not considered necessary to enact that Nova Scotia and New Brunswick should be governed by English law. Their courts assumed the English law to be in force there upon the principles of common law. The leading case is *Uniacke* v. *Dickson* (1848), James, 287. There Lord Mansfield's statement, "the colonies take all the common and statute law of England applicable to their situation and condition," was adopted by the Supreme Court of Nova Scotia.

BRITISH COLUMBIA.—British Columbia became a self-governing colony in 1858, and entered the Dominion as a Province by an Order in Council, dated 16th May, 1871. The British Columbia Act, called the "English Law Act" (R.S.B.C. 1897, c. 115), provides "that the civil laws of England as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, should be in force in all parts of British Columbia."

ONTARIO.—The Province of Quebec was divided into the

two provinces of Upper and Lower Canada by the Constitutional Act of 1791 (31 Geo. III. c. 31). Lower Canada retained her old law. The first Parliament of Upper Canada which met at Newark, now Niagara, on 17th September, 1792, enacted as its first measure "that in all matters of controversy relative to property and civil rights resort shall be had to the laws of England (as they stood on the 15th day of October, 1792), as the rule for the decision of the same" (32 Geo. III. c. 1). The two Provinces were reunited by the Union Act of 1840 (3 & 4 Vict. c. 35), but each portion retained its former laws. By the B.N.A. Act of 1867 Upper and Lower Canada again became separate Provinces, and entered the Dominion each with its independent legal system.

In Manitoba the law is the "laws of England as they were on the 15th July, 1870" (Dominion Act, 51 Vict. c. 33). Manitoba was made a Province by an Order in Council after the passing by the Dominion of the Manitoba Act (33 Vict. c. 3).

The North-West Territories Act (Rev. Statutes of Canada c. 50) provides (sec. 11) that the laws of England shall be law, as at 15th July, 1870, "in so far as the same are applicable to the Territories" (see also the Judicature Ordinance in the Consolidated Ordinances of the N.W. Territories Act c. 21).

The Yukon Territory Act 1898 (61 Vict. c. 6), which makes the Yukon a separate territory, and no longer part of the North-West Territories, declares that the laws in force in the N.W. shall continue in force in the Yukon. So that the N.W. Territories, Manitoba, and the Yukon, all have as the basis of their law the laws of England as at 15th July, 1870, in so far as applicable.

OTHER TERRITORIES.—All other territories not yet organised are, by an Order in Council of 31st July, 1880, "subject to the laws for the time being in force in the Dominion of Canada, in so far as such laws are applicable thereto."

QUEBEC.—The introduction of the French law into

Canada dates from 1863. Prior to that date there was no established judicial system. The early Governors did what was right in their own eyes. They administered, no doubt, a rough justice—and not seldom as we may suspect a rougher injustice, and troubled themselves very little with legal subtleties. In 1663 the "Company of the Hundred Associates"—the trading company which largely controlled the country—was at last dissolved, and Louis XIV. by an Ordinance reorganised the Government. He established at Quebec the Supreme Council, afterwards styled the Superior Council, with powers both administrative and judicial. They were entitled also to appoint subordinate judges at Quebec, Montreal, and Three Rivers. It is distinctly declared that the law to be applied is to be, so far as practicable, the *Coutume de Paris*. France had at that time a bewildering diversity of local *coutumes*, and it was necessary to select one of them for the colony. That of Paris had long enjoyed a sort of prominence, partly due to the importance of the capital, partly to the intrinsic merit of the *Coutume* itself, and partly to the authority of the Commentators who had illustrated it by their learning. One of the greatest of them —Du Moulin—calls it *caput omnium hujus regni et totius etiam Galliae Belgicae consuetudinum*. It was, in fact, asserted by some of the old writers that the *Coutume de Paris* was, in a certain sense, the common law of France. If the custom of the locality in which a dispute arose was silent upon the legal point involved, the judge was to have regard to the *Coutume de Paris*. Perhaps no such absolute rule existed. It is, at any rate, denied by other writers of high authority. See Dalloz, Répertoire *s.v.* Lois, No. 35. But there is no doubt that the *Coutume de Paris* was frequently referred to by judges interpreting other *Coutumes*, though they may not have regarded its provisions as strictly binding. One of its early editors—Brodeau—describes it in this way, "*Cette Coutume dont l'air doux et salubre est respiré par messieurs du parlement, est comme la maîtresse coutume, ordinairement étendue par leurs arrêts aux autres*

Coutumes, pour les cas qui n'y sont point décidés, principalement es matières qui sont du pur droit français, non empruntées à la jurisprudence romaine" (see Lareau, "Histoire du Droit Canadien," i. 140; Giraud, "Précis de l'ancien droit coutumier," p. 3). In its character then as "la maîtresse coutume" the custom of Paris was generally, if not invariably, selected when it was necessary to determine the law which should govern an old French colony. It was introduced in this way into the French possessions in the Indies, into the State of Louisiana, and as we have seen, into Canada (*Denizart, s.v. Colonie; Merlin, s.v. Colonie*).

With the *Coutume de Paris* came in, of course, also the general laws applicable to the whole of France—the "*lois et ordonnances*" as they existed in 1663 (see *Lareau, Histoire du Droit Canadien*, vol. i. pp. 106, *et seq.; Dalloz Répertoire, s.v. Lois*, No. 25). The French kings, being practically absolute monarchs, legislated largely by "ordonnances" and "édits." These "ordonnances" were, however, not enforced by the Courts within the jurisdiction of one of the "*Parlements*" until they had been registered by this "Parlement" (see *Dalloz, Rep., s.v. Lois*, No. 27; *Esmein, Histoire du Droit Français*, pp. 520, *seq.*). After the institution of the Superior Court at Quebec doubts arose as to whether "ordonnances" issued after 1663 were valid in the Colony, if not registered by the Superior Council. It was maintained by some that, for this purpose, the Council at Quebec was in the same position as one of the French *Parlements*. The question is one of great importance from the fact that several "ordonnances" were issued during the French régime which were, so to speak, codifications of certain branches of the law. The chief of these are the *Ordonnance du Commerce* of 1673, that *des Donations* of 1731, that *des Testaments* of 1735, that *des Inscriptions de Faux* of 1737, and that *des Substitutions* of 1747. None of these were registered in Canada (Mignault, Droit Civil Canadien, i. p. 22). The arguments on both sides are very fully stated by Mons. Lareau (Histoire du Droit

Canadien, vol. i. p. 120). That learned writer thinks that registration in Canada was essential, but it is rather singular that he does not refer to a judgment of the Privy Council, which, if authority is of any value, completely settles the point. In the case of *Symes* v. *Cuivillier* (5 App. Ca. 138), the Judicial Committee held that the *Ordonnance des Donations* did not extend to Canada, solely on the ground that it had never been registered at Quebec.

Canada was ceded by France to Britain in 1763, and for about ten years the law was in some uncertainty. In 1774, by the Quebec Act (14 Geo. III. c. 83) it was enacted that "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada"—*i.e.*, to the French law as it was before the Cession. The Criminal law of England was to continue in force.

After the passing of the Code Napoléon in 1804, countries which, like this province and Louisiana, were governed by the French law, as it was before that Code, were left in a very awkward position. The Code Napoléon had amended the law in a great many details, and had cleared away many anomalies and obscurities. A new brood of commentators at once settled down upon the new Code, The French market was flooded with the works of the older writers who had expounded the former law. The unhappy lawyers of Canada and Louisiana were left to beat their brains over crabbed old French commentators whose works were now in France herself almost superseded. It is bad enough to have to find out the law of to-day. What must it have been to have to find the French law as it stood in 1763? Indeed as to many questions it was necessary to go further back, for the French law in 1763 might be found in an *Ordonnance* which did not apply to Canada. Even if the lawyers had all been familiar with the French language, the position would have been lamentable. But for the lawyers, and their number was always increasing, whose mother tongue was English, it was intolerable. In 1857, largely through the energy of Sir George Cartier, an Act

was passed appointing commissioners to codify the law of Lower Canada (C.S.L.C. Ch. 2). On 1st August, 1866, the Civil Code came into operation. In its compilation great use was naturally made of the French codes. But, although the substance of the Law of Quebec is mainly derived from French sources, there are important branches of it which are drawn from the laws of England. I can only name the chief of these :—

1. The Criminal Law.

2. The Law of Merchant Shipping.

3. The Law of Bills and Notes. These are governed by the Dominion Act of 1890, 53 Vict. cap. 33, which closely follows the English Bills of Exchange Act.

4. The Law of Insurance. This is mainly of English origin. It falls partly within the sphere of the Dominion, and partly within that of the Provincial Parliament upon the principles explained by the Judicial Committee in *Citizen's Insurance Company* v. *Parsons*, 7 App. Ca. 96 (The Dominion Act is R.S.C. 1886, The Insurance Act, as amended by 51 Vict. c. 28, 57 Vict. c. 20, and 58 & 59 Vict. c. 20 ; see Holt, "Insurance Law of Canada").

5. The Law of Banks and Banking regulated by the Bank Act 1890 (53 Vict. c. 31). A good deal of this is Canadian or American rather than English. But it is not of French origin.

6. The rules of evidence in commercial matters are those of England, except in cases where the Code has specially provided otherwise (C.C. 1206).

This brief summary is enough to show that Quebec is not now a country wholly governed by the *Droit Civil*. The development of the law of Louisiana affords a very close parallel. Their Civil Code, like ours, is on the whole very similar to the Code Napoléon. Like us also their Criminal law, their Commercial law, and their Law of Evidence are chiefly drawn from English sources (see the interesting volume by Judge Howe, "*Studies in the Civil Law*").

In enumerating the countries whose law may not inac-

curately be called "modern Roman law," I have not included Scotland. In Scotland, as in Quebec and in Louisiana, the law occupies a position midway between the Common law and the Civil law. It has drawn largely from both sources. Arthur Duck, whose famous work, *De usu et auctoritate juris Civilis Romanorum in Dominiis Principum Christianorum* was published in 1653, classes Scotland among the countries of the Civil law. He says: "In those things which in the written laws of Scotland are laid down contrary to the Civil law of the Romans, the Civil law yields; but where the Municipal law is defective, and in omitted cases, the judges among the Scots are not left to follow their own arbitrary opinion, but are bound to judge according to the Roman law. And accordingly this opinion has prevailed among foreign nations that the English settle lawsuits solely according to their own law, but that the Scots, like the other nations of Europe, use the Roman law."(*a*)

This description of the *degree* of *authority* which attached in Scotland to the Roman law, would have been equally accurate of the law of France and Germany. But the union with England turned the development of the Scots law into a different channel. As to its substance, a great part of the Common law of Scotland is still Roman law, not more modified than the *Heutiges Römisches Recht* of Germany or the *Droit Civil* of France. The law of obligations, except where changed by legislation, or the law of servitudes, is very much the same in Scotland as in France. Moreover Scotland has preserved the same technical phraseology. A French lawyer, turning over a Scots law book, would be astonished to meet at every turn terms with which he was familiar. When the Civil Code of Lower Canada was being prepared, the commissioners were sometimes hard put to it to turn into English some term of the old French law. The quaint words of the English Common

(*a*) I have not access to Duck's work, and cite this passage as translated by Professor Dove Wilson in his Storr's Lecture at Yale on "The Reception of the Roman Law in Scotland" (*Jur. Rev.* vol. ix. p. 389, 1897).

law were too terribly strange. It was not unnaturally feared that French-Canadian lawyers would never take very kindly to them. By a happy thought the commissioners turned to the Scots law and found sometimes there the very words they wanted—*e.g.*, instead of taking the English term "Easement" they retained "Servitude," which is a term which both France and Scotland inherited from the Roman law (see M'Cord's Edition of the Civil Code, p. ix. of the Preface). But though much of the substance and nearly all the language of Scottish law is still very Roman, Scotland could not now be classed, as in Duck's time, with the countries of the Civil law. There are three main reasons for this change. 1. Before the union with England there was very little commercial law in Scotland, and not much in England. English mercantile law is in great measure a product of the eighteenth century. Lord Mansfield, who has been called its "father," sat as Chief Justice during the years 1756–1788. Largely through the writings of Bell the rules of commercial law, which Mansfield and his successors laid down in England, found their way to Scotland, and were accepted there as sound (see Bell's Preface to the first edition of his Commentaries). Instead of turning to the Pandects, or to the French or Dutch Civilians, for light upon a point of commercial law, the Scots lawyers began to turn to the reports of English cases.

2. During the period of nearly two centuries since the Union there has been a mass of legislation applicable to both England and Scotland.

3. The English doctrine of the binding authority of decided cases has taken as firm root in Scotland as in England.

If this were the only matter in which the Scots law differed from the Civil law systems of Continental Europe, it would be enough to constitute a great gulf between it and them. The great peculiarity of the Common law is that it is mainly case-law (see Markby, "Elements of Law," sec. 92, and the interesting work of Mr. J. F. Dillon, "The Laws

and Jurisprudence of England and America," Boston, 1895). This it is, far more than the differences of substance, which makes the English law appear to the French lawyer so incomprehensible. This it is also which makes the English lawyer not inclined to look to the French law for light upon a case. The Frenchman is aghast, and not unnaturally, at the thought that, before he can make sure of the law upon some small point, he must ransack three or four thousand volumes of reports, or trust to a text-writer who may have omitted the only case which is in point. He agrees with Tennyson's description of it as—

> "The lawless science of our law,
> The codeless myriad of precedent;
> That wilderness of single instances
> Through which a few, by wit or fortune led,
> May beat a pathway out to wealth and fame."

Has not the Common law been wittily called "Chaos tempered by Fisher's Digest"? for which we shall now say "Mew's Digest."

On the other hand, the English lawyer, if the French Code contains nothing on the point or gives an uncertain sound upon it, can only turn to the works of the various commentators of repute. If they are unanimous—which they hardly ever are—except upon elementary principles—he may be pretty sure that the Court would take the same view. If they differ and argue with each other, and this is natural to their kind, the enquirer must decide for himself which view seems the sound one. As for previous decisions of the Courts he will get little aid from them. In the first place, they are so meagrely reported as to make it impossible to be sure of the precise state of the facts. In the second place, they abstain carefully from laying down any general rule, and even if a principle can be abstracted from them, it is quite open to the same Court to repudiate it when the question comes up again, and no other Court is in the least bound by the decision. I am putting the case strongly to emphasise the distinction. In practice a reasonable Court,

for the sake of its own dignity, will generally stick to its opinion upon a particular point. The deliberate judgments of a Court like the *Cour de Cassation* command the highest respect from other courts, and few judges would lightly disregard them. And there are many points upon which there is a train of decisions, "*jurisprudence constante*" as the French writers call it, which it would be almost revolutionary for a judge not to follow. But all this comes to something very far short of our binding authority of precedents. The English doctrine has lately been spoken of by Sir F. Pollock and Mr. Maitland "as our modern, our very modern conception of rigorous case law" (Pollock and Maitland, "History of English Law," vol. i. p. 187).

These learned writers say that previous cases were not binding on the judges in the time of Bracton—*i.e.*, in the thirteenth century. At that time they were regarded merely as illustrations of the custom of the Court (*ibid.* 18). As to what is modern and what is ancient, a good deal depends upon the point of view. Speaking from the historical depth of the thirteenth century, the doctrine may be called modern. But a rule which was clearly settled at the latest by the middle of the eighteenth century need not in Canada blush for its want of antiquity. Blackstone's Commentaries began to be published in 1765. Sir Wm. Markby says: "But long before Blackstone's time a very important change had taken place in the view held by judges as to the force of prior decisions. These decisions were at first evidence only of what the practice had been, guiding but not compelling those who consulted them to a conclusion. But when Blackstone wrote, each single decision standing by itself had already become an authority which no succeeding judge was at liberty to disregard" (Elements, sec. 91). Blackstone (Comm. i. 69), says himself, "It is an established rule to abide by former precedents where the same points come again into litigation, as well to keep the scale of justice even and steady, as also because the law in that case being solemnly determined, what before was uncertain is now

become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments." His exception that a precedent "flatly absurd or unjust" need not be followed is not now correct. So that for a hundred and fifty years at least there has been this very profound difference between the English law and the systems built upon the foundations of the Roman law. The English lawyer must prop up his argument at every point by a decided case. The text-books are little more than digests or indices to help him to find the cases. They are indispensable to "temper the chaos," but they are not to be relied upon as authority. The French or German lawyer piles up citations from the commentators who support his view, trusting to his adversary to refer to the others, and the Court makes up its mind which of the opposing "systèmes" is the sound one. A few analogous cases may or may not be referred to, but, except where there is a stream of judgments in the same sense, comparatively little weight attaches to them. In Scotland the Continental theory, resting as it does upon the traditions of the Roman law, held its own until towards the end of the eighteenth century. Erskine, a very high authority upon the law at that period, uses language which would be accepted as correct in France at the present day. His "Institutes" were published in 1773. He says, speaking of prior decisions of the Court of Session, the Supreme Court of Scotland, "they have no proper authority in similar cases, because the tacit consent on which unwritten law is founded cannot be inferred from the judicial proceedings of any Court of law however distinguished by dignity or character, and judgments ought not to be pronounced by examples or precedents."(*a*) "Decisions, therefore," says Erskine, "though they bind the parties litigating, create no obligation on the

(*a*) This is the Roman law-text always cited upon this point by French writers, "non exemplis sed legibus judicandum est." It is in a rescript of the year 529 by Justinian himself, and the whole passage very clearly states that no decision is to have binding authority (Code 7. 45, 13).

judges to follow in the same track, if it shall appear to them contrary to law. It is, however, certain that they are frequently the occasion of establishing usages, which after they have gathered force by a sufficient length of time, must from the tacit consent of the State make part of our unwritten law" (Inst. i. 1, 47). In the reports of Scots cases during the eighteenth century, the English rule is gradually winning its way to recognition (see *e.g.*, Hailes' Reports, *passim*). In one case Lord Gardenston says, "One decision is nothing. This puts me in mind of what Gulliver reports as to the law of England, that if once judges go wrong they make it a rule never to come right." But for a hundred years or so Scots law has become altogether a system of case law, and precedents are followed with the same certainty as in England.

I think this is not without interest to us here, because, unless I am mistaken, the law of Quebec exhibits a strong tendency in the same direction. The judges of the Privy Council, and most of the judges of the Supreme Court of Canada, are thoroughly imbued with the spirit of the Common law as to the value of cases. And, in the Courts within the Province, the reported cases are consulted and relied upon to a greater extent than is done in France and Germany. Apparently the rule that cases ought to be followed is gradually becoming more fixed. In order to make the French or Continental view clear, I will take the liberty of translating the statement of one of the most recent commentators, M. Baudry-Lacantinerie. In his *Traité théorique et pratique de droit civil* (Paris, 1896), he puts it thus: "The whole group of decisions rendered upon the same point of law constitutes what is called the jurisprudence. When these decisions are more or less divergent we say that the jurisprudence is uncertain, hesitating, varying. When they agree perfectly for a sufficient length of time to make it possible to determine their tendency with precision, we say that the jurisprudence is fixed in a certain sense, that it is constant. The reports of cases occupy a very important

place in the science of law, and among them the judgments of the *Cour de Cassation* hold the highest rank. The solemn judgments of that Court, if only on account of the circumstances under which they are pronounced, are those which have the highest authority. Is it necessary to add that from the theoretical point of view this authority can never be binding? (*ne peut être qu'une autorité de raison—i.e.*, is effectual only *imperio rationis* and not *ratione imperii*). The decision of a judge can, in fact, never have the effect of legislation. Seeing that the judicial power and the legislative power are, and ought to remain separate, an attempt has been made to prevent the former encroaching upon the domain of the latter. This is why the Code Civil provides in Art. 5, '*il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.*'" "This provision means," continues Baudry-Lacantinerie, "that a judge is not entitled to bind himself for the future as to the interpretation of the laws, and to declare that henceforth he will always interpret it in the same sense. He can only give judgment upon the particular case presented, and is limited to the conclusions of the action as laid. A judge can only determine as to the past, he can make no regulation as to the future, whereas the legislator determines as to the future and does not deal with the past. In our ancient law the *Parlements* under cover of the confusion which in feudal times existed as to rights of jurisdiction and rights of legislation, arrogated to themselves the power of rendering judgments which laid down a general principle to be followed. These they called '*arrêts de réglement.*' This course was defended by giving a favourable construction to certain texts of the Roman law especially 'non ambigitur senatum jus facere posse' (D. i. 3, 9), and by asserting that power of this kind had been tacitly delegated to the Parliaments by the king. After having decided the particular case before them in a certain way they declared that for the future they would follow the same principle, and that all Courts within the jurisdiction of their

Parlement ought to decide cases in that sense. These *arrêts de réglement*, being veritable laws, were published like laws. It is true they were always issued '*sous le bon plaisir du roi.*' The king could annul them, but, until he did so, they constituted a local law valid within the territory of the Parliament, provisional in that they came in place of a real law which appeared to be required, and supplementary in this sense that they could only fill up the *lacunæ* of the law written or customary. As being contrary to the principle of the separation of powers and to the unity of legislation, they were prohibited by the law 16 of 24th August, 1790, and Art. 5 of the Civil Code has reproduced this prohibition." Laurent (i. 280) puts the same view with his usual point and vigour. He cites the sayings of two eminent authorities. President Bouhier says, "*Il n'y a que les petits génies, les esprits plebéiens qui se laissent entrainer par les exemples au lieu d'ecouter la raison.*" President de Thou says, "*Les arrêts sont bons pour ceux qui les obtiennent, il faut se garder de les invoquer comme une autorité décisive.*"

A French judge has to give articulate grounds or "*motifs*" for his decision, and he is not allowed to give a previous decided case as a *motif* (*motiver sa décision par un renvoi à une autre décision antérieure*), for this would be to appear to lend to the case cited the authority of a *disposition générale et réglementaire* (see Pandectes Françaises, *s.v.* Arrêts de Réglement and Arrêts du Conseil).

If stronger proof were desired of the difference between the two laws, it would be found in the peculiar procedure of the *Cour de Cassation*. When a decision of a lower Court has been "cassed" or quashed, this puts the parties again in the same position as before the first judgment. The cause is remitted to a tribunal of the same rank as the one which pronounced the quashed judgment. This tribunal called the Tribunal "de renvoi" is quite free to decide the point again contrary to the view of the *Cour de Cassation*. If it does so, there may be a second "*pourvoi.*" The *Cour de Cassation* examines this, all its chambers sitting together "*toutes*

les chambres réunies," and if it comes to the same conclusion as before, its decision is final. A second Court of remit must adopt the doctrine of law laid down by the *Cour de Cassation*. But even then, if the same point arises in a subsequent case between different parties, the view of the Court of Cassation is not binding on the Courts. A proposal to make it so was rejected after discussion, as contrary to the doctrine of the "Séparation des pouvoirs" (Dalloz, Répertoire, *s.v.* Lois, No. 485). It is only binding as between the parties.

Now any volume of the English Reports contains fifty cases which demonstrate that English lawyers have definitely ranged themselves with those whom President Bouhier terms the "petits génies" and the "esprits plebéiens." It is elementary that every Court in the country is now bound by a decision of the House of Lords, and every subordinate Court is bound equally by a judgment of the Court of Appeal. In a case as to the meaning of a Statute of New South Wales which was in the same terms as an Imperial Statute, the Judicial Committee expressed the opinion that a Colonial Court ought not to refuse to follow a construction adopted by the Court of Appeal in England. The question was whether a deposit with a stakeholder to abid the event of a match between two horses was a wagering contract and therefore null under the Act (*Trimble* v. *Hill*, 1877, 5 App. Ca. at p. 344).

One could easily compile a companion volume to "Cases Overruled" which should consist of "Cases Reluctantly Followed." To give a single instance, in the case of *De Nicols* v. *Cartier* (1898), 2 Ch. p. 60, the Court of Appeal had to consider the important question whether the rights of French spouses married in France under the *régime de communauté* were changed by their having subsequently acquired an English domicile. Lindley M.R. in giving the judgment of the Court began, "The question raised in this appeal turns upon whether the decision of the House of Lords in the case of *Lashley & Hog* applies to it or not." The Court clearly say in giving their decision that they do not agree

with *Lashley & Hog* as *raison écrite*, but they conceive themselves bound to follow it and do so. "After *Lashley & Hog*," their Lordships say, "we do not consider the question open to judicial review in this country." And, in fact, it is hardly too much to say that the whole fabric of English Chancery law has been built upon the very *dispositions réglementaires* which the French Code forbids. Whole chapters of law, and not among the least important, were introduced by the old chancellors. What greater legal reform can be named than the introduction of the rules unknown to the old common law—that a married woman might have a separate estate free from the control of her husband—"the blessed doctrine of the separate estate of a married woman" as it has been called by a great judge? This, and how many other profound changes in the law, were made by a chancellor inventing a rule which he and his successors followed. Sir George Jessel said of this doctrine of separate use and of other cardinal rules of equity, "in many cases we know the names of the chancellors who invented them" (*Re Hallett Estate*, L.R. 13 Ch. D. p. 710). Logically, it is impossible to deny that English judges have in a hundred cases legislated when they affected to be merely declaring the law. They have disregarded the "séparation des pouvoirs" which the French jurists insist upon so forcibly. But their legislation has been so extremely gradual, it has been on the whole so cleverly cloaked, and—what is more important—it has been so truly equitable and beneficial, that, in spite of logic, the practical good sense of the country has always been with them.

The Article of French Civil Code (Art. 5) which forbids the "dispositions réglementaires" was not reproduced in the Civil Code of Lower Canada. The Commissioners in their Report (vol. i. p. 143) omit it in silence, and M. Mignault thinks its omission was not intended to make any change in the law (Droit Civil Canadien, vol. i. p. 106). It is at least safe to say that its absence is favourable to the hardening of the rule that precedents should be followed.

In Ontario the Judicature Act (c. 51 of Rev. Stat. of Ont. sec. 81) has express provisions as to the effect of judicial decisions. The decision of a Divisional Court of the Court of Appeal (which is a Court of three judges—sec. 70) is to be binding on the Court of Appeal, and on all other judges, and is not to be departed from in later cases without the concurrence of the judges who gave the decision. Of course its authority is to determine, if it is overruled by a higher Court. And, what is even more strict still, a judge sitting alone is to be bound by a prior decision of a co-ordinate Court, but if the second judge thinks the decision wrong, he may refer it to a higher Court.

I venture to think that this different view as to the value of case-law creates in practice the most profound difference between the civil law and the common law. In the substance of the law there are, naturally, differences important enough, and full of interest to the student of comparative jurisprudence. Such a student in Canada does not need to go outside the gates. Within the Dominion itself he may observe the merits and demerits of the two great systems, and the slow but constant processes of action and reaction between them.